1671. *November* 18. Anent PAYMENTS to BANKRUPTS.

*Quæritur*, If a man may lawfully pay a sum owing by him to a bankrupt, after he knows the man to be bankrupt. If he have a decreet of *bonorum*, and so has disponed all his goods to his creditors; or if any creditor has arrested it, then it is out of all doubt he cannot safely pay it to the debtor; but the question is, where there is nothing of that. In which case I think he may.

*Advocates' MS. No.* 263, *folio* 114.

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1671. *November* 18. Anent BONA FIDE POSSESSION.

WHERE a man possesses by a coloured title, whereof reduction is raised at the instance of one who has a better right, yet he retains possession ay till sentence; *quæritur*, if he be obliged to restore the fruits consumed by him between the citation and the sentence, if *fructus perceptos facit suos usque ad sententiam.* I think not, for though the citation puts him *in mala fide* to dispone and alienate *rem litigiosam*, yet it puts him not *in mala fide* to possess ay and while your right be found better; seeing *dubius est eventus litis*, and till I see your right I think my own good. *See Mackeinzie's Observations on the act of Parliament* 1621, *page* 137.

*Advocates' MS. No.* 264, *folio* 114.

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1671. *February* 21, and *November* 21. CORBET *against* ANNA MEINZIES, Relict of MAXWELL of WRAES.

*February* 21.—A woman pursuing upon her liferent infeftment, it was ALLEGED,—That the same could not be respected; because, by a clause in the contract of marriage, (which was the ground and warrant of her infeftment,) it was expressly provided that she should have no right to her liferent till L.1000 promitted in name of tocher were paid.

To which it was ANSWERED,—That this would have met the woman well, if she had been the party binder and contractor for her tocher; but *ita est*, it is not she but her brother that becomes obliged for the same; and it were a very hard and unreasonable thing to defraud a woman of her liferent, because through your own default ye have not recovered the tocher; let her have her liferent, and pursue ye as accords.

My Lord Advocate would admit her infeftment, notwithstanding of the said quality in the contract matrimonial; unless the defender would say that, *per eum non stetit* the tocher is not paid, and that he has used diligence for recovering the same, and yet cannot get it. *Advocates' MS. No.* 135, *folio* 90.

*November* 21.—In the action mentioned *supra*, No. 135, (the parties were one Corbet, compriser, and Anna Meinzies, Relict of Maxwell of Wraes,) there being *avisandum* to the Lords, anent the point there debated, viz. whether a woman should be excluded from the benefit of her liferent, because, by a clause in her contract of marriage, it was provided that she have no liferent till her tocher were paid; whose answer being reported this day, they found, notwithstanding of the said quality, the wife behoved to have her jointure; seeing *stante matrimonio* she could use no diligence for purifying the condition, and it was the husband's fault the tocher was not got in, for which the wife must not smart; unless they will say that he did diligence against the debtors to recover the tocher, but could not get it of them, or that *ex notorietate conditionis*, they were insolvent. *Favor matrimonii* is the cause of this. *Interest rei publicæ mulieres esse nuptas et sic dotatas; L. 2. de jure dotium.* Yet Gayl, *libro* 2, *observatione* 81, excludes the wife, unless she prove *dotem suam fuisse marito numeratam.*

*Advocates' MS. No.* 265, *folio* 114.

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1671. *November* 14, and 21. COLLISONE *against* MEINZIES.

*November* 14.—This is a pursuit at the instance of an executor dative *ad non executa,* for payment of a sum owing to a defunct by ———.

It was ALLEGED,—No process at the pursuer's instance, because this sum to which he confirms himself executor creditor *ad non executa,* is not only confirmed in the principal testament, but it is also executed, in so far as the principal executor has recovered sentence against the debtor therefore.

REPLIED,—A sum cannot be estimated to be executed by a naked sentence recovered, unless he has also got payment, and discharged the same; for if it were executed by a sentence, then it should be *in bonis executoris;* if he died, it should be confirmed in his testament, and belong to his executors; if he went to the horn, that sum should also fall in his escheat, and belong to the fisk; with many other inconveniencies.

It was DUPLIED,—After sentence they are undoubtedly *in bonis executoris,* for this reason, he has all the acts of property and dominion that can be condescended on: he may uplift it, he may discharge it, and he may assign it; it will also fall under his escheat; in respect of all which there can be no place for a dative *ad non executa.* Neither is this a novelty, seeing the Lords have found the same frequently before, viz. betwixt Douny and Young, on the 10th of November, 1666; and lately, in 1670, in Mr. Arthur Gordon, Advocate, his cause against the Laird of Drum.

They were to have the Lords' answer on it.

*Advocates' MS. No.* 255, *folio* 112.

*November* 21.—The debate *supra,* at the 255th number, betwixt Collisone and Meinzies being reported this day, the Lords found the testament sufficiently executed by a sentence, and so there was no room for a dative *ad non executum.* It will also prove a great preparative for its falling under escheat, &c.

*Advocates' MS. No.* 266, *folio* 114.